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No. 81-2345

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN A. LYLE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether petitioner, a retired Army officer who was employed by a high school district to teach ROTC, was entitled to exclude any portion of his salary as an "allowance" for subsistence or quarters paid to active-duty members of the Armed Forces.

The pertinent facts may be summarized as follows: In 1974, petitioner retired from active service as an officer in the United States Army. For five months in 1976, petitioner was employed by the Ector County Independent School District as an instructor for the Junior Reserve Officer Training Corps ("Junior ROTC") program at Permian High School, Odessa, Texas. The school district paid petitioner $5,134.53 for his services as instructor. In addition, petitioner received his regular military retirement pay.

On audit, the Commissioner rejected petitioner's contention that he was entitled to exclude a portion of his salary for teaching Junior ROTC under Treasury Regulations on Income Tax (1954 Code), Section 1.61-2(b) (26 C.F.R.). That Regulation provides that "[s]ubsistence * * * allowances granted commissioned officers * * * of the Armed Forces * * * and amounts received by them as commutation of quarters, are to be excluded from gross income." The Tax Court[1] held that the petitioner was not entitled to exclude any portion of his salary as a subsistence and quarters allowance, and the court of appeals affirmed (Pet. App. B).

1. Petitioner argues (Pet. 5-7) that he received excludable subsistence and quarters allowances in reliance on 10 U.S.C. 2031(d), which provides, *inter alia*, that retired officers teaching Junior ROTC may continue to receive their retirement pay and that high schools employing such officers may pay them "an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would receive if ordered to active duty."

The courts below correctly held that this statute only prescribes a formula for the maximum amount of pay retired officers may be given and does not provide them with excludable "allowances." See *Sweeney* v. *United States*, 74-2 U.S.T.C. (CCH), para. 9672 (N.D. Ga. 1974); *Scott* v. *United States*, 74-1 U.S.T.C. (CCH), para. 9281 (D. S.C. 1973). See also Rev. Rul. 71-307, 1971-2 Cum. Bull. 78, 79; 55 Comp. Gen. 44, 48 (1975). Moreover, the statute itself specifically refutes petitioner's reading. Section 2031(d)(2) provides that retired officers teaching Junior ROTC are not "considered to be on active duty or

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[1]The findings of fact and opinion of the Tax Court are reported at 76 T.C. 668 (1981).

inactive duty training *for any purpose*" (emphasis supplied). Since one must be on active duty or on training to be eligible for subsistence and quarters allowances (see 37 U.S.C. 204(a)(1) and (2); 402 and 403), it is clear that retired officers are not eligible for those allowances.

Petitioner's contention (Pet. 7) that the statute reflects Congress' intent that retirees be treated the same as active duty officers, who would be entitled to allowances, is also refuted by the statute which expressly provides that retirees may be paid less than the equivalent active duty pay. Nor does this different treatment, as between retired and active duty officers, violate the Constitution, as petitioner contends (Pet. 6, 7). Their obvious differences in legal status are sufficient to justify different treatment. Cf. *Puglisi* v. *United States*, 564 F. 2d 403, 409-411 (Ct. Cl. 1977), cert. denied, 435 U.S. 968 (1978).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982

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[2]Contrary to petitioner's assertion (Pet. 5), the decision below does not conflict with decisions either of this Court or of the Court of Claims.

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